Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Petition of Mark Kwaterski, et al., for Review of WPDES General Permit Reissuance No. WI-5067831-2 for Land Disturbing Construction Activities.	Case No. IH-02-03

RULING ON MOTIONS FOR SUMMARY DISPOSITION

The PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources (DNR), by

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Mark Kwaterski, et al Named Petitioners (the petitioners), by

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On August 1, 2002, the petitioners, Mark Kwaterski, et al. (Kwaterski), filed a Motion for Summary Disposition in the above-captioned matter. On August 29, 2002, the Wisconsin Department of Natural Resources responded, and filed its own Cross-Motion for Summary Disposition. On September 10, 2002, Kwaterski filed a Reply Brief.

Procedural Status

At a prehearing conference held on June 21, 2002, all parties agreed to the submission of dispositive motions to be decided by the Division. Both the Motion to Dismiss and the Cross-Motion are supported by accompanying affidavits. A motion to dismiss supported by affidavits is to be treated as a motion for summary judgment under Wis. Stat. § 802.02. (See: Wis. Stat. § 802.06(2))

In reaching the decision on the motion the administrative law judge has applied the methodology as described by the Wisconsin Supreme Court. The first step of the standard methodology used by a trial court when faced with a motion for summary judgment requires the court to examine pleadings to determine whether a claim for relief has been stated and a material issue of fact presented; if a claim for relief has been stated, inquiry then shifts to the moving party's affidavits or other proof to determine whether the moving party has made a prima facie case for summary judgment.

If the moving party has made a prima facie case for summary judgment, the court must examine affidavits and other proof of the opposing party to determine whether there exists disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn sufficient to entitle the opposing party to trial. *Voss v. City of Middleton*, 470 N.W.2d 625, 162 Wis. 2d 737 (1991).

Further, construction of a statute is an issue of law and can therefore be properly dealt with by summary judgment. *Lange v. Kurtz*, 301 N.W.2d 262, 100 Wis. 2d 40 (Ct. App. 1980).

Factual Background

On August 27, 2001, the DNR re-issued the General Permit for stormwater discharges (WPDES No. WI-5067831-2) ("the General Permit"). The only significant change to the General Permit relevant to this appeal is that the General Permit Program now excludes construction sites on non-Indian lands within the Oneida reservation in northeastern Wisconsin.

The petitioners include five individuals who live and work within, and five municipalities whose boundaries include portions of, the Oneida reservation area. The General Permit for stormwater discharges would no longer be available to them for projects within these areas. Instead, they would be required to apply for individual WPDES permits for specified construction sites generally affecting five or more acres.

The petitioners set forth, and the DNR does not dispute, significant differences between the General and Individual WPDES permitting process. Central differences are the notice process and the longer period of time required to obtain an individual WPDES permit. A general permit requires only a "notice of intent" prior to beginning land disturbing activities. Wis. Admin. Code NR 216.44. An applicant is also required to develop and implement a construction site erosion control plan for the site, but the plan need not be sent to the Department. Wis. Admin. Code § NR 216.45. If the DNR does not request additional information, an applicant is authorized to begin construction activities covered by the general permit 14 working days after the date the Department receives the notice of intent. Wis. Admin. Code § 216.44.

In contrast to a general permit, an individual permit requires an application be submitted at least six months in advance of the planned activity and often takes much longer to obtain. (See: Wis. Stat. § 283.37(1)). Further, the proposed permit is subject to a published notice and 30-day comment period. Wis. Stat. § 283.39. During that period, an informational hearing may be requested, which then involves time to provide notice of the hearing and to conduct the hearing itself. (Wis. Stat. § 283.49) The United States Environmental Protection Agency (EPA)

also has a 90-day period for review of the permit. Wis. Stat. § 283.41. The DNR then often has an additional 50 days to enter a final decision on issuance of the permit. (See: Wis. Admin. Code NR 200.10)

The DNR Fact Sheet relating to re-issuance of the General Permit was produced in August, 2001. The Fact Sheet stated as follows:

> Due to a Memorandum of Agreement between the State of Wisconsin and the Oneida Tribe of Indians of Wisconsin, signed on May 8, 1998, this general permit will not apply to storm water discharges from construction sites within the boundaries of the Oneida Indian Reservation that are seeking initial coverage under the permit after September 30, 2001. A specific permit shall be required within the boundaries of the Oneida Indian Reservation for initial coverage of storm water discharges from construction sites. Kent Affidavits Ex. 3, p. 4.

The Initial Notice for Public Comment stated as follows:

> An important change to note in the proposed reissued permits is that the proposed general permits will no longer be used to authorize initial storm water discharge permit coverage within the Oneida Indian Reservation after September 30, 2001. . . . [a]fter September 30, 2001, an individual permit will be required to authorize storm water discharges and application for an individual permit shall be made 6 months prior to commencement of construction activities at the site. This permit change was made in accordance with an agreement between the State and the Oneida Indian Tribe. Kent Affidavit, Ex. 2, p. 1.

At Part IV, B. 7 of the Memorandum Agreement between the Oneida Nation and the DNR, the parties agreed as follows:

> The parties agree that all stormwater discharge permits issued to on-reservation discharges whether issued by the State pursuant to NR 216 or by the Tribe pursuant to tribal law, shall be individual permits and fully subject to the requirements of this agreement. General permits shall not be considered adequate authorization for on-reservation discharges of stormwater.

However, while neither side has repudiated it, the Memorandum Agreement would appear to be no longer binding because of the following language:

> E. If the litigation in either *State of Wisconsin v. U.S. EPA; and Carol Browner and Sokaogon Chippewa Community*, Case No. 96-C-90, or *State of Wisconsin v. U.S. EPA; and Carol Browner and Oneida Nation*, Case No. 96-C-329, (and/or related cases *Jack Schweiner, et al. v. U.S. EPA, et al.*, Case No. 96-C-521 and *Brown County, et al. v. U.S. EPA, et al.*, Case No. 96-C-605) results in a decision on the merits which recognizes the authority of the EPA to grant TAS status for sections 303 and 401 of the Clean Water Act to either the Tribe or the Sokaogon Chippewa Community, **the parties agree that they are not bound by**

> **the provisions of this Section IV**. The parties further agree to meet within 20 days of the aforementioned decision to determine an effective system of managing water quality on the Reservation which is acceptable to both parties. (Emphasis added.)

On September 21, 2001, the United States Court of Appeals for the Seventh Circuit upheld EPA's authority to grant treatment as a state (TAS) to the tribe in *State of Wisconsin v. Environmental Protection Agency*, 266 F.3d 741 (7th Cir., 2001), U.S. cert. denied, June 3, 2002.

The DNR acknowledges that the above-referenced decision "did result in a decision on the merits" within the meaning of the Memorandum Agreement. (DNR brief, p. 6). However, the DNR argues that the language of the agreement notwithstanding, that the post-agreement course of conduct of the parties "may be considered a modification of the agreement, so that the parties remain bound to their responsibilities despite the intervening decision." (Id., p. 7) The petitioners dispute that the DNR is bound to the terms of the Agreement, or that the "course of conduct" of the parties has been sufficiently "unequivocal and unambiguous" to constitute a modification of the agreement by the parties course of conduct. See: *Nelsen v. Farmer's Mutual Auto Ins. Co.*, 4 Wis. 2d 36, 56, 90 N.W.2d 123 (1958).

However, the continuing effectiveness of the agreement is not a central issue if the agreement exceeds the lawful authority of the DNR to enter into such an agreement. (See: Generally, *Hiltpold v. T-Shirts Plus, Inc.*, 98 Wis. 2d 711, 716-17, 298 N.W.2d 217 (WI. Ct. App. 1980)

In any event, the petitioners were not parties to the Memorandum Agreement. Their right to be heard in this mater came as a result of the notice provision of the WPDES General Permit process. While the petitioners are not party to the Memorandum Agreement, they are "parties" subject to the statutes and administrative code provisions that apply to all Wisconsin residents. The petitioners argue that the DNR's actions in amending the terms of the General Permit conflict with the provisions of Wis. Admin. Code NR 216. Further, that whether the Memorandum Agreement is binding or not, this action can not be undertaken without a change to NR 216.

Specifically, the petitioners argue, Wis. Admin. Code NR 216.42(1) provide that the Notice of Intent and General Permit procedures shall be filed by any landowner subject to the construction activity permit requirements. Further, that Wis. Admin. Code NR 216.53(2) and (3) provided as follows:

> (2) DENIAL OR REVOCATION OF GENERAL PERMIT. The department may deny or revoke coverage under a general WPDES permit and require submittal of an application for an individual WPDES storm water discharge permit based on a review of the complete notice of intent or other information.
>
> (3) INDIVIDUAL PERMIT. The department may require the landowner of any storm water discharge covered by a general WPDES permit issued pursuant to

this subchapter to apply for and obtain an individual WPDES storm water discharge permit if any of the following occur:

> (a) The storm water discharge is determined to be a significant source of pollution and more appropriately regulated by an individual WPDES storm water discharge permit;
>
> (b) The storm water discharge is not in compliance with the terms and conditions of this chapter, or of a general WPDES permit issued pursuant to this chapter;
>
> (c) A change occurs in the availability of demonstrated technology or practices for the control or abatement of pollutants from the storm water discharge; or
>
> (d) Effluent limitations or standards are promulgated for a storm water discharge that are different than the conditions contained in this chapter.

Plainly, the exception for non-Indian lands within the Oneida Reservation is not a listed provision under Wis. Admin. Code § NR 216.53(3). The administrative code does not list such construction sites as an area in which "the department may require an individual permit."

The Division of Hearings and Appeals must give legal effect to properly promulgated administrative code provisions. (See: Wis. Stat. § 227.45(4)) Further, a state agency must be bound by the regulations which they themselves have promulgated. *State ex. re. Anderson-El v. Cooke*, 234 Wis. 2d 626, 636, 610 N.W.2d 821 (Wis. 2000), citing, *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959). When an agency does not follow its own rules, the agency acts beyond its authority. *State ex. Re. Jones v. Franklin*, 151 Wis. 2d 419, 423, 444 N.W.2d 738 (Wis. Ct. App. 1989)

If the DNR wants to exclude properties located within reservation lands from the general permit coverage, it must amend NR 216 to do so. To not do so would violate the DNR's own rules under NR 216, and would thus exceed the Department's authority. The petitioners have thus made out a "prima facie" case for summary judgment.

A review of the DNR's arguments and supporting affidavits sets forth in detail the DNR's position that it was a reasonable policy choice to continue to follow the Memorandum Agreement after the 7th Circuit Court of Appeals affirmed the EPA's decision to grant TAS authority to the tribe. The DNR brief argues ". . . the State's policy choice to take the cautious route and avoid a possible lawsuit or assertion of TAS authority was reasonable." (DNR brief, p. 8) While the policy does appear reasonable as a tactical choice, this in itself, does not give the DNR legal authority to effectively change an administrative code provision by means of a change in the provisions of the General Permit Program.

The DNR then argues that the U.S. EPA's position on the Department's jurisdiction within Indian Country provides a legal basis for its actions in altering General Permit eligibility within Indian Country. Specifically, the DNR argues that the EPA would object to the Department's jurisdiction to issue General Permits in Indian Country, but not to its authority to issue individual WPDES permits.

The Department argues that Wis. Admin. Code § NR 203.12 provides legal authority to amend the General Permit to exclude Indian Country. Specifically, the Department notes that:

> "The department shall have the discretion to . . . modify any **terms and conditions** of a draft permit based on consideration of required standards, the permit application, statements by the public **or by government agencies, and any other pertinent information**. [emphasis added]

By considering the U.S. EPA's written communication, as either a government agency comment or "pertinent information", the Department argues, it acted as directed by controlling administrative rule in finalizing the General Permit. However, on its face NR 203.12 relates to the "terms and conditions" of a permit and not to the more fundamental question of eligibility for a general permit. While the EPA, the Department of the Interior or other federal agencies may have specific concerns that the DNR should consider with respect to the terms and conditions of a particular permit, it would conflict with fundamental due process to allow such comments to deny the petitioners access to a program otherwise made available to them by the Department's own regulations.

Further, it is not clear that the state has authority to issue either general permits or individual permits in Indian Country. As the petitioners argue, there are two separate but related jurisdictional disputes that contribute to the state's position in this matter. First, there is dispute over who can issue and require stormwater discharge permits in Indian Country. Both the state DNR and federal EPA claim such authority. As the petitioners' note in their brief, under the federal Clean Water Act, the EPA has the authority to delegate implementation of the Clean Water Act to states, including the authority to issue discharge permits. See 42 USC § 1342, Clean Water Act § 402. The EPA's position is that while it has delegated such authority to the State of Wisconsin, it has not done so for Indian Country. The DNR's position has been that such authority has been delegated, or that if it has not been delegated, the State can operate a program within Indian Country under state law independent of delegation under the federal Clean Water Act. The second jurisdictional argument relates to who has authority to set water quality standards. As the DNR notes, the Indian tribes can be treated as states for purposes of implementing the federal Clean Water Act within their TAS authority. 42 USC § 1377, Clean Water Act § 518. While the federally recognized tribes could seek TAS authority to issue permits, no tribe has sought such authority. Instead, federally recognized Indian tribes including those in Wisconsin have sought to be treated as states only for the purpose of setting water quality standards under 42 USC § 1313, Clean Water Act § 303. If a tribe were granted such TAS authority, such standards would be incorporated into any NPDES or WPDES permit.

The jurisdictional confusion has led to a situation where the petitioners have to apply for both federal and state stormwater permits for the same development projects. In any event, if the

DNR lacks authority to issue general permits in Indian Country, it should amend NR 216 to reflect this fact. Doing so by the "back door" method of amending the General Permit conflicts with Wis. Admin. Code NR 216.53 and thus exceeds the Department's legal authority.

The petitioners also argue that the DNR's action violates Equal Protection principles because non-member tribal residents are treated differently than member residents. The Division does not have authority to rule on the constitutionality of statutes or regulations. *McManus v. WDOR,* 155 Wis. 2d 450, 454, 455 N.W.2d 906 (Wis. Ct. App. 1990). Further, because the Division finds that the Department's actions exceed its legal authority, it is not necessary to rule on this issue. However, it is noted that the petitioners have preserved this argument for appeal.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the petitioners motion to dismiss be GRANTED.

IT IS FURTHER ORDERED that the cross-motion of the DNR be DENIED.

Dated at Madison, Wisconsin on October 2, 2002.

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By _____
JEFFREY D. BOLDT
ADMINISTRATIV LAW JUDGE

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NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53 to insure strict compliance with all its requirements.